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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

– X

In re:	
	Chapter 9
NEW YORK CITY OFF-TRACK BETTING CORPORATION,	Case No. 09-17121 (MG)
Debtor.	

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STATEMENT OF OFFICIAL COMMITTEE OF UNSECURED CREDITORS IN RESPONSE TO OBJECTION OF STANDARDBRED OWNERS ASSOCIATIONS, INC. TO DEBTOR'S MOTION SEEKING APPROVAL OF DISCLOSURE STATEMENT AND PLAN FOR DISTRIBUTION TO CREDITORS

TO THE HONORABLE MARTIN GLENN
UNITED STATES BANKRUPTCY JUDGE:

The Official Committee of Unsecured Creditors (the "Committee") in response and reply to the Objection of Standardbred Owners Association, Inc. ("SOA") to the motion (the "Motion") filed by New York City Off-Track Betting Corporation (the "Debtor") seeking approval of a disclosure statement and plan (the "Disclosure Statement" and "Plan", respectively) for distribution to creditors, respectfully represents as follows:

INTRODUCTION

1. The Debtor's case is a unique one, and in many instances, one of first impression.

2. SOA raises confirmation issues in opposition to the Motion. It is clear that a court may consider confirmation issues in the context of a motion to approve a disclosure statement where such objections may render a plan unconfirmable.

3. As a threshold issue, SOA is not, nor does it purport to be, a creditor of the Debtor. Therefore, SOA lacks standing to object to the Motion.

4. Assuming, *arguendo*, SOA indeed has standing to object, because of the unique and truly unusual circumstances of the case, the material contributions of the NY Tracks (as defined in the Plan) to the facilitation of the Debtor's reorganization, the unique relationship of SOA to the NY Tracks, and the limited and restrictive nature of non-debtor third party releases and exculpation provisions in the Plan which are at the core of SOA's objection, SOA's objection should be denied and the disclosure statement should be approved.

RELATIONSHIP

5. Upon information and belief, SOA purports to have standing to object to the Motion based upon its contract with Yonkers Racing Corporation ("Yonkers"), effective January 1, 2004, to which the Debtor is not a party. That contract is not before the Court.

6. Upon information and belief, pursuant to its contract with Yonkers, SOA, as representative of Yonkers' horsemen, is entitled to a portion of handle received by Yonkers from the Debtor. SOA claims that the liability of Yonkers to SOA is approximately $11 million. However, upon information and belief, such sums would be payable from cash paid by the Debtor to Yonkers. Upon information and belief, SOA's premise that Yonkers "owes" an $11 million dollar debt to the Yonkers horsemen for the uncollected NYC OTB commissions is false. The practice in the harness industry in NY is that the track operator must split with the horsemen (usually 50%) of Indirect Commissions actually received from NYC OTB. If the Plan

is not approved and NYC OTB liquidates, Yonkers and in turn SOA would likely recover substantially less.

THE PLAN AND UNIQUE CIRCUMSTANCES

7. Due to the Debtor's circumstances, it does not have the ability to pay its pre-petition obligations to Yonkers or the other NY Tracks. More significantly, the Debtor has accrued and is unable to pay tens of millions of dollars of post-petition obligations to the NY Tracks including Yonkers.

8. Unable to pay pre- and post-petition obligations to the NY Tracks, the Debtor has negotiated a plan to provide, as a distribution to the NY Tracks its automated debt wagering ("ADW") business. These alone are a "truly unusual" circumstances. See, e.g. In re Metromedia Fiber Network, Inc., 416 F.3d 136 (2d Cir. 2005) (unique or unusual circumstances required to justify non-debtor third-party releases).

9. The Committee and the NY Tracks, including Yonkers, have been faced with the unfortunate reality – the Debtor's lack of funds with which to reorganize leaves it with the real prospect that it will have to be shuttered and liquidated. Necessity became the mother of invention.

10. The NY Tracks were asked to forego any cash distribution on account of their pre- and post-petition claims against the Debtor and to accept, in lieu, the conveyance of the ADW business. As a result, there is no cash coming to the NY Tracks (including Yonkers) which would be the *res* against which SOA could claim against Yonkers.

11. The NY Tracks have been faced with two options – accept the ADW or refuse and take partial responsibility for the closure and liquidation of the Debtor.

12. In the face of this difficult dilemma, the NY Tracks have been bombarded by direct and immediate threats that the SOA will hold the NY Tracks, and particularly Yonkers, responsible for its role in negotiating and agreeing to any plan structure which would adversely affect SOA's ability to recover a part of the cash which would otherwise flow from the Debtor through the NY Tracks to their respective horsemen's associations including, in the case of Yonkers, SOA. In view of these threats, the NY Tracks have sought narrow and limited release and exculpation provisions to protect themselves from future assault by their horsemen.

THE COURT HAS SUBJECT MATTER JURISDICTION, THE NY TRACKS ARE MAKING SUBSTANTIAL CONTRIBUTION, AND THE RELEAES AND EXCULPATION PROVISIONS ARE LIMITED AND NARROW

A. Subject Matter Jurisdiction

13. Recognizing the fact that non-debtor third party releases tend to lend themselves to abuse, the Plan's third-party releases were negotiated and narrowly drawn to address the limited and specific issues and concerns at hand. Metromedia Fiber Network, 416 F.3d 136.

14. The horsemen want money from the estate which would ordinary be part of the funds that flow from the Debtor, through the NY Tracks, to the horsemen. And yet the NY Tracks, between a rock and a hard-place, have been asked to walk away from that cash. Insistence on cash by the NY Tracks would affect the *res* of the estate. Accepting the ADW in lieu is what facilitates the successful adjustment of the Debtor's debts. It is over this *res* that the Court has jurisdiction. *See, e.g.* Johns-Manville Corp., 517 F.3d 52 (2d Cir. 2008) ("a bankruptcy court only has jurisdiction to enjoin third-party non-debtor claims that directly affect

the *res* of the bankruptcy estate.") The ADW is precisely the *res* that the NY Tracks are recovering as consideration, in lieu of cash.

B. Substantial Contribution

15. In this unusual chapter 9 case, where the unique and unusual circumstances include the facts that (a) post petition obligations continued to accrue and are part of the claims pool for which there is no cash recovery, (b) the failure of the NY Tracks to accept the interest in the ADW in lieu of cash would result in the dismissal of the Case and liquidation of the Debtor, and (c) barring protection from the horsemen, as noted by Yonkers in its Response to SOA's Objection, the NY Tracks would not support the Plan. Without this substantial contribution by the NY Tracks, the Debtor's reorganization and survival would not occur.

16. It is the making of this substantial contribution that necessitates and justifies the limited non-debtor third-party releases and exculpation. SOA's objection to the Disclosure Statement distorts the facts when it states that Yonkers is receiving independent benefits such as a share of the new ADW or legislation. Upon information and belief, the NY Tracks will share with the Horsemen's purse account distributions paid by the new ADW. Additional key parts of the legislation are designed to improve revenue which are hoped to generate more money in the purse accounts.

C. Narrowly Drawn Third-Party Releases and Exculpation

17. SOA's claim that the exculpation, release and injunction provisions of the Plan are "exceedingly broad" is a vast overstatement.

18. Under the Plan, an "Exculpated Claim" is one "related to any act or omission in connection with, relating to or arising out of the Debtor's restructuring efforts . . . formulation, preparation, dissemination, negotiation or filing of the Disclosure Statement or the

Plan . . .” and the documentation, agreements and legislation necessary to implement the Plan. An “Exculpated Party” would include the members of the Committee, and, among others, their officers, directors, members, agents, affiliates, consultants, advisors, professionals, in each case only in their capacity as such.

19. The threat of SOA against Yonkers for its role in the formulation of the Plan merits precisely such protection and presents the unusual circumstances justifying and necessitating same. See, In re Drier LLP, 429 B.R. 112 (Bankr., S.D.N.Y. 2010) (“a third-party action that will directly and adversely impact the reorganization more likely to present the “unusual circumstances” required under Metromedia”).

20. Similarly, the “Limited Third Party Release” is for claims “based on or relating to, or in any manner arising from the Debtor’s restructuring efforts, the Case, the compromise of any Claim of any member of the Creditors’ Committee, the Legislation or relationship of any Track Party and the Debtor; provided, however, that this Article V.L shall not release any Third Party from any cause of action solely arising out of the failure of that Track Party to pay into the purse account such Applicable Contractual Percentage of any annual profits that such Track Party actual receives from Newco ADW on account of that Track Party’s equity interest in Newco ADW . . . provided, further, that this Article V.L shall not release the Track Parties from any cause of action . . . determined . . . to have constituted gross negligence, willful misconduct on fraud.”

21. What the NY Tracks need insulation from is exactly what the Debtor is demanding to facilitate its restructuring, a walk-away from cash due from the Debtor which is exactly what SOA is threatening to hold Yonkers liable for. The release narrowly carves out what it is receiving in lieu of cash from the Debtor – the interest in ADW.

22. Nothing in the release or exculpation provisions prohibits, impairs or encumbers SOA from asserting its claims against the interest in ADW that will be coming to Yonkers. In fact, upon information and belief, other horsemen's groups have already negotiated with other NY Tracks for their claims to be addressed from the interest in the ADW to be distributed to the NY Tracks. SOA's right in this regard is likewise preserved.

23. Hence the limited non-debtor release and exculpation provisions are appropriately narrow and carefully tailored to address the need and issue at hand.

CONCLUSION

The SOA's objection to the approval of the Disclosure Statement should be overruled, and the Debtors should be approved for solicitation.

Dated: New York, New York
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